

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

PAULETTE MARGARET MELVILLE,

Appellant.

IN RE THE PERSONAL RESTRAINT
PETITION OF:

PAULETTE MELVILLE.

No. 40063-4-II
consolidated
with

No. 40815-5-II

UNPUBLISHED

Worswick, J. — Paulette Melville appeals the trial court’s denial of her CrR 7.8 motion for review of her sentence, arguing that defense counsel’s failure to assist with the motion violated her right to counsel and that the trial court abused its discretion in denying her request for a Drug Offender Sentencing Alternative (DOSA) sentence.¹ In a personal restraint petition consolidated with her appeal, she raises pro se additional claims based on jury coercion, violation of spousal privilege, the trial court’s denial of a recusal motion, ineffective assistance of trial counsel, and the trial court’s denial of a pretrial suppression motion. We agree that counsel provided ineffective assistance, as the record indicates no involvement by him in the case other than one phone call to Melville. Accordingly, we reverse the trial court in her direct appeal and

¹ RCW 9.94A.660.

remand for new CrR 7.8 proceedings with new counsel. And we deny her personal restraint petition.

FACTS

On April 13, 2005, a jury convicted Melville of unlawful possession of a controlled substance, morphine; unlawful possession of a controlled substance, methamphetamine; unlawful possession with intent to manufacture or deliver a controlled substance, oxycodone; and unlawful possession of 40 grams or less of marijuana.

At sentencing, defense counsel requested and argued for a DOSA sentence. The trial court heard statements from various individuals in support of the DOSA request, including that of a chemical dependency professional. Ultimately, the trial court stated that it could sentence Melville to a DOSA, but denied the request. In doing so, it noted her extensive criminal history, much of which involved drugs. It further noted her failed previous chemical dependency treatment opportunities granted in lieu of incarceration for her Idaho and Utah convictions and stated that it had to “keep [Melville] away from being able to possess a drug with intent to deliver it again, to possess and use and abuse other drugs.” II Clerk’s Papers (CP) at 250. The trial court sentenced her to a maximum standard range sentence of 120 months’ incarceration.

After Division Three of this court mandated Melville’s case to the trial court for further proceedings, she filed a pro se CrR 7.8 motion for review of her sentence.² Specifically, she requested that the trial court reconsider its denial of her DOSA request. On July 2, 2008, at an

² Division Three decided Melville’s previous appeal in an unpublished decision, *State v. Melville*, noted at 139 Wn. App. 1024, 2007 WL 1748713, at *6 (2007). Division Three transferred her direct appeal and PRP to Division Two.

initial hearing on the motion, the trial court concluded that she had timely filed it and agreed to appoint counsel to represent her as it appeared she did not understand the motion she had filed.

On July 8, 2008, the trial court appointed counsel for Melville. On January 2, 2009, the trial court filed a letter from Melville dated November 9, 2008. In her letter, she stated that, in September 2008, the trial court had directed defense counsel to call her, and defense counsel had complied. But she further stated that defense counsel called once to request some information and had never called again. She expressed her concern that defense counsel was not taking an interest in her case and requested new counsel be appointed.

In a letter filed January 14, 2009, the trial court informed Melville that it had already ruled on her motion on December 31, 2008. In a letter dated January 15, 2009, she replied that she had not received the court's ruling and reiterated that defense counsel had not taken any interest in her case. The record contains no filings from counsel, not even a notice of appearance. In its December 31, 2008 order, the trial court denied her motion to review her sentence.³ Melville appeals.

ANALYSIS

Direct Appeal

Melville contends that defense counsel's apparent failure to file a notice of appearance, motions, and briefs or to present any argument in support of her CrR 7.8 motion at a hearing denied her right to counsel under the federal and state constitutions. We agree.

³ The trial court's order referred to a CrR 7.3 motion. But Melville brought her motion under CrR 7.8, and the trial court referred to it as a CrR 7.8 motion at the initial hearing. We attribute the discrepancy to scrivener's error.

The Sixth Amendment guarantees a criminal defendant the right to effective counsel. U.S. Const. amend. VI. We must allow the right's purpose, ensuring the fairness of proceedings, to guide us in giving the right its meaning. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

For purposes of a CrR 7.8 motion, the trial court first determines whether the motion establishes grounds for relief. *State v. Robinson*, 153 Wn.2d 689, 696, 107 P.3d 90 (2005). If the trial court determines the motion is meritless, it may deny the motion without a hearing on the merits. *Robinson*, 153 Wn.2d at 696. If the motion establishes grounds for relief, the trial court may appoint counsel under CrR 7.8. *Robinson*, 153 Wn.2d at 696. Because the right to appointed counsel for these motions arises from a court rule, as opposed to the constitution, we review a trial court's decision not to appoint counsel under the harmless error standard. *Robinson*, 153 Wn.2d at 696-97.

Once the trial court appoints counsel, however, constitutional rights may attach. For example, a defendant may waive her right to counsel and represent herself. *State v. McDonald*, 143 Wn.2d 506, 511, 22 P.3d 791 (2001). Nonetheless, the trial court may choose to appoint standby counsel for a defendant. *McDonald*, 143 Wn.2d at 511. Once appointed, standby counsel owes a defendant limited duties and obligations that, when violated, prejudice the proceedings and require reversal. *McDonald*, 143 Wn.2d at 512-13; *see also State v. Pugh*, 153 Wn. App. 569, 580, 222 P.3d 821 (2009). These duties and obligations of standby counsel, and thus the extent of the defendant's right, are limited because the defendant "assume[s] complete responsibility for [her] own representation." *McDonald*, 143 Wn.2d at 512.

In the CrR 7.8 context, however, a defendant does not necessarily assume responsibility for her own representation. Once the trial court appoints counsel, a defendant cedes responsibility for her representation and completely relies on appointed counsel's performance in every remaining stage of the proceedings. Accordingly, the rationale limiting standby counsel's duties and obligations to a defendant are absent in this context. Allowing fairness of the proceedings to guide our interpretation of the right, we conclude that “ ‘the right to counsel is the right to the effective assistance of counsel’ ” in CrR 7.8 proceedings. *Strickland*, 466 U.S. at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)).

Furthermore, in limited circumstances of ineffective assistance of counsel, we presume prejudice. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004). These circumstances include the “ ‘complete denial of counsel,’ ” and where “ ‘counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.’ ” *Davis*, 152 Wn.2d at 674 (quoting *United States v. Cronin*, 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)).

Here, the record contains no indication that appointed counsel took any action regarding Melville's CrR 7.8 motion other than calling her at the trial court's direction. Counsel's complete failure to subject the prosecution's case to adversarial testing violated Melville's right to effective counsel. Accordingly, we reverse the trial court's CrR 7.8 determination and remand for new CrR 7.8 proceedings with new counsel.⁴

⁴ Because we reverse and remand, we do not address Melville's abuse of discretion claims.

Personal Restraint Petition

In addition to her direct appeal, Melville also raises in her personal restraint petition claims of jury coercion, violation of spousal privilege, the trial court's denial of a recusal motion, ineffective assistance of trial counsel, and the trial court's denial of a pretrial suppression motion.

A personal restraint petitioner may not renew issues raised on direct appeal and rejected on their merits by an appellate court unless she demonstrates that the interests of justice require relitigation of those issues. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). In Melville's previous direct appeal, she raised all these issues, and Division Three rejected them on their merits. *Melville*, 2007 WL 1748713, at *5. She does not present any new evidence and does not argue that the interests of justice require reconsideration of these issues. Therefore, we deny her personal restraint petition.

Reversed and remand for new CrR 7.8 proceedings with new counsel. The personal restraint petition is denied.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Armstrong, J.

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Penoyar, C.J.